SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 557

VINCENT PACELLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

VINCENT PACELLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vincent Pacelli, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on July 18, 1966.*

Citations to Opinions Below

The opinion and judgment of the United States Court of Appeals for the Second Circuit are as yet unreported and are printed as Appendices A and B hereto. The District Court wrote an opinion on a pretrial motion which is reported at 251 F. Supp. 702, which is printed as Appendix C hereto.

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* Co-appellants Kahn and Schawartzberg in the Court of Appeals below, are, we believe, perfecting petitions for writs of certiorari. However, as they moved for reargument in the Court of Appeals, their petitions are due to be filed at a later date.

Jurisdiction

The judgment of the Circuit Court of Appeals was rendered on July 18, 1966. Mr. Justice Harlan extended the petitioner's time in which to file a petition for a writ of certiorari to September 16, 1966. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254(1).

Questions Presented

1.(a) In a criminal trial for obstructing justice and conspiring to obstruct justice, where one co-defendant rested at the end of the Government's case and took no further part in the examination of witnesses, did the Trial Court err in refusing the defendant's requested instruction that the testimony of the co-defendant who testified in her own behalf should not be considered and that only testimony on the Government's case should be considered by the jury in determining his guilt, thereby denying the defendant the effective assistance of counsel and the right to a jury trial?

(b) Should not this Court, in the light of reason and experience and in the exercise of its supervisory powers over the administration of criminal justice in the United States courts, hold, in view of the fact that this is a question of first impression, that a defendant in a joint criminal trial who rests at the end of the Government's case and does not examine witnesses, even if he is not entitled to a severance, is entitled to go to the jury solely on the evidence presented by the Government?

2. Did the placing of electronic recording equipment on a Government witness so as to record conversations with a co-defendant violate petitioner's rights?

3. Was it error for the jury to have been present when material producible under 18 U.S.C. §3500 was marked for identification?

The Constitution and the Statutes

The Fifth Amendment to the Constitution of the United States provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense."

Section 371 of Title 18 of the United States Code provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 1503 of Title 18 of the United States Code provides:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 1622 of Title 18 of the United States Code provides:

> "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

Rule 26 of the Federal Rules of Criminal Procedure provides in part:

> "* * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Statement

Petitioner Pacelli was indicted for substantive offenses of obstructing justice jointly with one Schawartzberg, and conspiring so to do along with one Kahn as well as Schawartzberg. The thrust of the Government's proof was that there were endeavors to tamper with the testimony of an unsavory character named Hedges, who in due course was to become a witness against the petitioner Pacelli in a narcotics trial at which he was convicted.*

In August 1962, Hedges agreed to testify against Pacelli and others in connection with a narcotics investigation, but it was not until June of 1964 that he first appeared and testified before a grand jury. The substantive offense of which Pacelli was accused and convicted in this case related to an incident on January 9, 1963, when, according to the Government's proof, Pacelli and Schawartzberg spoke to Patricia Hedges about her husband's testifying. Schawartzberg was the so-called law clerk of the co-defendant Frances Kahn, a woman lawyer who had represented Hedges at a trial in which he (Hedges) had been convicted and received

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* Pacelli is presently petitioning this Court for a writ of certiorari in connection with the affirmance of that case: *Pacelli* v. *United States,* No. 427, October 1966 Term.

a fifteen-year sentence. She continued to see Hedges until a time after his first appearance before a grand jury. Although this was sharply disputed, the tendency of the Government's proof was that she sought to exercise an improper influence on Hedges' decision to testify on behalf of the Government against Pacelli and others. Some of her conversations with Hedges in jail were recorded, with Hedges' knowledge, by Government agents. Schawartzberg and Kahn were acquitted of the substantive offenses charged against them in the indictment but convicted, along with Pacelli, of the conspiracy to obstruct justice. Pacelli was convicted of a substantive offense alleged to have taken place in January 1963 as well as of the conspiracy. He was sentenced to two years on the conspiracy and two years on the substantive count, the sentences to run concurrently with one another.

The facts necessary to Pacelli's contention in this petition are set forth in that part of the petition which deals with those contentions. Beyond that the facts are sufficiently stated in the opinion of the Court of Appeals.

Reasons for Granting the Writ.

1. The Trial Court denied the petitioner Pacelli, who rested at the end of the Government's case, a fair trial and the effective assistance of counsel as guaranteed by the Fifth and Sixth Amendments, by refusing to limit the evidence the jury might consider in determining his guilt to that presented by the Government on its case.

a. *The prejudice and the relief sought.*

At the outset it is necessary to state that this is not simply another instance where a defendant asks for a severance from a prejudicial joinder, though Pacelli was vastly prejudiced by being joined with the co-defendants in the trial. That prejudice flowed from two sources. The first was that the co-defendant Kahn, a woman lawyer, and the co-defendant Schawartzberg, her factotum and "law clerk", who, heedless of the ancient maxim, represented himself, charged that they were the victims of a "conspiracy between the government and the worst elements of society to destroy a lawyer" (22—Opening for Kahn).* Miss Kahn was likened to Clarence Darrow (25) and the lawyers who represented Peter Zenger (24). The support in the record for this position was not over-strong. Miss Kahn did not testify to any unusual animus against her by high government officials or to any radical or unorthodox political or social views, and in her testimony the government was able to develop that insofar as cases arising in the Southern District of New York were concerned, there was one acquittal in a counterfeiting case in 1963 and one reversal on

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* Numbers in parentheses refer to pages of the stenographic record of trial; when followed by the letter "A" numbers refer to pages of the appellants' joint appendix.

the government's confession of error in 1960 (1350-1357). This point was not missed by the prosecutor, and in summation Mr. Martin invited the jury to "Look at that record. If the Government was going to single out a criminal lawyer to frame would it pick on defendant Kahn? I submit that record shows that they would not" (1686; 576A). Pacelli eschewed this line of defense from the moment it was introduced and sought a mistrial and a severance (26-27; 9-10A).

The second source of the prejudice arising from the joint trial was that the Government's case against Pacelli, that is to say, the direct competent evidence against him, was extremely thin. The Government did not show any meetings or connection between Pacelli and Hedges, the witness supposedly being tampered with, and it had no competent proof of a connection between Pacelli and the lawyer Kahn. Hedges did, of course, testify to conversations purportedly had with Kahn, but these were hearsay and not admissible against Pacelli until and unless the jury concluded from evidence directly competent against Pacelli that there was a conspiracy of which he was a member. The sole piece of competent evidence against Pacelli came from Patricia Hedges who testified as to the incident of January 9, 1963, which formed the basis of the substantive count of which Pacelli was convicted. Two federal agents, Manning and Benjamin, were present at that incident, but their testimony merely tended to confirm Mrs. Hedges' account. The thrust of her testimony was that in a meeting arranged by Schwartzberg, at which Schwartzberg was present, Pacelli was introduced as a friend of her husband's and offered her money with which she and her husband might go away

during, and perhaps after, Hedges' then pending appeal. Mrs. Hedges testified:

> "Q. And that your getting this money was not contingent on whether or not Charlie won the appeal, isn't that so? A. Oh, it was. No.
>
> Q. It was not contingent upon that, right? A. No, we could have the money either way.
>
> Q. You could have the money either way? A. Yes.
>
> Q. To go away pending the disposition of the appeal? A. That's right." (1007; 338A)

From this conversation the jury was asked to conclude beyond a reasonable doubt that Pacelli was attempting to alter, suppress and nullify the testimony of Hedges. Not one word was said by Pacelli about testimony and there is nothing in the record to show or indicate that the offer was in any way conditioned on or related to testimony.

Another item of evidence admitted by the Trial Judge only on the conspiracy count related to conversations purportedly had between the previous wife of Hedges, in July of 1962 and Pacelli, concerning bail and inquiring as to who represented Hedges in his then pending appeal (309-311A). These two incidents were the only items of evidence between August of 1962 and September of 1964 which represented competent evidence against Pacelli.

Miss Kahn testified in her own behalf, and while denying any impropriety fleshed out the prosecutor's skeletal proof. She conceded that Hedges told her that he had been offered money to go away but insisted that he had never told her who or where or when such an offer had been made (1332). She testified that she had once done fifty dollars worth of legal work for Pacelli and was taxed on cross examination

with grand jury testimony in which she had sworn that she had represented Pacelli in connection with several different matters (1421-1427).

The Government's principal witness, Charles Hedges, was an unsavory character whose career in crime started at the age of fourteen and whose delicate moral sensibilities, as they existed at the time of the trial, are typified by the following incident. On cross examination Hedges admitted that in 1960 he had helped a friend clean up a motel room in Florida after a murder. He had made a bundle out of the sheets and dumped them into a canal and helped wash a bloody rug; the victim had been hit with a jack handle and then ice-picked, according to the friend. He had not mentioned this when asked about his participation in criminal activities because he didn't think it was criminal, he had just done what he was instructed to do. The Court said: "He wants to know whether you thought that was criminal. Did you?" and Hedges replied "Well, on my part, to be honest, no, I didn't think it was", and gave as his reason that he "didn't do anything" (314). He also had told the Florida police that the reason he had gone to Florida was to do a "safe job" (309-322).

In view of the relative sparsity of the Government's proof and the despicable character of the Government's chief witness, Pacelli took a very different line of defense. He sought to attack the sufficiency legally and factually of the government's proof. He rested at the end of the government's case (1211-1215; 427-431A) and introduced no evidence, and did not examine the co-defendant Kahn when offered an opportunity to do so and simply maintained he had rested (1349; 483A). At the time the defendant Pacelli

rested the Trial Court was urged to instruct the jury not to consider against Pacelli evidence developed on any defense which the co-defendants might put in, on the theory that "he has a right to go to the jury on the Government's case" (1212; 428A). The Court declined to so charge at that time but indicated that it would cover the matter in its charge to the jury (1211-1214; 427-430A); an objection was taken to the Court's failure to so charge the jury (1742; 631-632A) and reiterated when the jury returned to request additional instructions on the second day of its deliberations (1828-1830; 696-698A).

Pacelli's line of defense was an attack on the sufficiency of the government's case and thus his counsel told the jury in summation:

> "He was the first one to rest. He says the government has produced certain evidence. He says that does not prove his guilt beyond a reasonable doubt, 'I am willing to go to the jury on the basis of that evidence and have you evaluate it.'" (1566)

By asking the Trial Court to permit him to rest and put the Government to its proof, Pacelli sought to avoid the two unfair advantages which the Government so frequently seeks to reap in multi-party conspiracy cases. The first is that as far as the effective assistance of counsel goes, defendants in a multi-party trial are drawn down to the lowest common denominator of judgment, taste and style, and certainly deprived of the effective assistance of counsel in shaping their defense. Not only must defense counsel meet the Government onslaught, but must also endeavor to survive the efforts of the co-defendants. This case is a perfect illustration of that principle in action. While it apparently

seemed appealing to the co-defendants to accuse the United States Attorney of being in league with an underworld character like Hedges in a venture to persecute a lawyer, it hardly requires a Lord Erskine to recognize that such a defense had the effect of telling the jury that if they acquitted the defendants they were implicitly finding the attorneys for the Government guilty of the gravest sort of misconduct.

Similarly, by joining defendants in a conspiracy and conspiratorial type of prosecution, the Government was able to sit back and wait for the defendant Kahn in her efforts to extricate herself to testify in a way that strengthened the Government's case against Pacelli.

The modest relief that Pacelli sought was simply to be permitted to rest at the end of the Government's case and go to the jury on that case. After the end of the Government's case Pacelli examined no further witnesses.

b. *The granting of the novel relief sought here would ameliorate the unfairness of multi-party trials without impairing the administration of justice.*

Neither counsel for the Government in the Court of Appeals, nor counsel for Pacelli, was able to cite any case decided in a Court of the United States which passed on the relief sought here. The Court of Appeals held that the damaging effect of the co-defendant Kahn's testimony did not justify a *severance*, citing *United States* v. *Houlihan*, 332 F. 2d 8, 15 (2d Cir.), *cert. denied* sub nom. *Legere* v. *United States*, 379 U.S. 828, 859 (1964), and concluded that the danger of prejudice to Pacelli from the fact that " . . . the jury may have thought it had to convict all three defendants in order to clear the Government of the charges made

by Schawartzberg and Kahn . . . was far too remote to require severance." We concede here, as we did in the Court of Appeals (page 23, Brief for Appellant Pacelli in the Court below) that there are strong arguments against the granting of a severance. Those arguments do not, in fact, turn on the "remoteness" of possible prejudice. They are practical arguments that have to do with the realities of the administration of justice and the difficulties of multiple and successive trials. The argument against severance was succinctly put by Learned Hand thusly:

> " . . . (T)here is no practical alternative except, as we have said, to give them immunity. The chance that a joint trial will not as to them be a fair trial, has to be balanced against the fact that it is a joint trial or none. Indeed, if we were to accept the argument, there would really be an end of trials for jointly conceived, or jointly executed, crimes, except in cases of the simplest character." *United States* v. *Cohen*, 145 F. 2d 82, 95-96 (2d Cir., 1944), *cert. den.* 323 U.S. 799.

However, there is an alternative to joint trial or no trial for a defendant in a multi-party case. The defendant should have the right, by resting at the end of the Government's case, to have the jury given limiting instructions requiring them to consider only the Government's case in judging his guilt. The defendant already has such a right in terms of the legal sufficiency of the case. As Judge Wright wrote, concurring, in *Cephus* v. *United States*, 324 F. 2d 893 (D.C. Cir. 1963), at 898:

> "The fact that exculpatory evidence offered by his co-defendant implicated appellant in the crime cannot deprive appellant of his rights under Rule 29(a).

> Nor can appellant's efforts, in introducing evidence in his own behalf to offset his co-defendant's evidence, trigger the invocation of the waiver doctrine. Whatever continued validity that archaic doctrine may have, it certainly has no application to the facts of this case. Indeed, a simple reading of Rule 29(a) indicates that the waiver doctrine is without validity in any case. A defendant cannot be boxed out of his Rule 29(a) rights by forcing him to go to trial with a co-defendant, or by waiting hopefully for him to convict himself."

It would seem that it makes even less sense to permit a defendant to be boxed out of his rights under the Fifth and Sixth amendments to have the Government prove his guilt beyond a reasonable doubt and to have the assistance of counsel by permitting the Government to join the defendants and hope that one or another co-defendant will embark upon a perilous or antagonistic line of defense or take the stand and inculpate someone standing in the dock alongside him. Certainly this is true where so simple and nondisruptive a method of relief is available as limiting instructions. The importance of limiting instructions is evident from the language of this Court in *Delli Paoli v. United States*, 352 U.S. 232 (1957) at 242:

> "Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

The Court of Appeals, without citation or analysis, dismissed Pacelli's contention that the Trial Court erred in refusing to give limiting instructions:

> "We find no merit in Pacelli's contention that because he rested his case and moved for acquittal at the close of the Government's case, the jury should have been instructed to consider as against him only the evidence adduced on the Government's case. The question of the sufficiency of the Government's case was a legal one; and once the trial court had decided that the Government's case was sufficient to go to the jury, we see no reason why the jury should not also have been free to consider the testimony of Pacelli's co-defendants."

Perhaps the Court's summary treatment of this question reflects the judicial attitude expressed in *United States* v. *Kelly*, 349 F. 2d 720 (2d Cir., 1965) at 766:

> "Doubtless prosecutors always hope co-defendants will turn on one another and thus enhance the chances that all will be found guilty. This may be exasperating to counsel, but it is not unlikely that, when all is said and done, the ends of justice will be attained."

While conspiracy and multi-party trials may, for the reasons suggested in *Kelly*, be exasperating to counsel, they must be something more than exasperating to anyone who views a Federal criminal trial as something other than an effort to gather a group of persons whom the Government believes, but cannot prove, guilty and put them to trial in the hope that they will convict one another.

This Court is by now undoubtedly innured to the citation by counsel in Federal conspiracy cases of *Krulewitch* v. *United States*, 336 U.S. 440 (1949) and the warnings contained in Mr. Justice Jackson's concurring opinion (*Id.* 445-446) as to the threat that conspiracy prosecutions pose to the fair administration of justice. In the light of reason

and the experience of the years that have intervened since *Krulewitch,* we submit that the holding we seek here would deprive prosecutors of unfair and improper advantages which have made conspiracy trials unduly popular, without impairing the even-handed and expeditious administration of criminal justice. Giving each defendant in a multi-party trial who elects to rest at the end of the Government's case the right, by requesting limiting instructions, to go to the jury on the Government's case would have a salutary effect on the fairness of trials of this sort. It would be prophylactic. The darling of the prosecutor's nursery, observed by Mr. Justice Jackson in 1949, has grown up to be a doxy.

2. The placing of electronic recording equipment on a Government witness so as to record conversations with a co-defendant violated petitioner's rights.

3. It was error for the jury to have been present when material producible under 18 U.S.C § 3500 was marked for identification.

We understand that the co-appellants in the Court of Appeals who are perfecting petitions for writs of certiorari are raising *inter alia* as grounds the points which we have indicated in our second and third questions and our second and third reasons for granting the writ. To spare this Court needless repetition we adopt their application for certiorari in regard to these two points.

One further matter requires brief discussion in connection with the recording of the conversations between Hedges and Kahn. Because he ruled adversely to the defendants prior to trial, Judge McClean explicitly left the question of the standing of Pacelli and Schawartzberg to object to the use of the recordings of the conversations between Kahn

and Hedges undecided. We respectfully submit that should this Court grant certiorari on the question of the recorded conversations, it should hear full argument addressed to the question of standing. At this point we content ourselves with suggesting that unlike search and seizures, the use of electronic recordings of any sort has important consequences for parties other than those directly subject to the recording and that this is particularly true in a conspiracy case of this sort.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES TO PETITION

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 438—September Term, 1965.

(Argued June 3, 1966 Decided July 18, 1966.)

Docket No. 30430

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCES KAHN, VINCENT PACELLI and ISRAEL SCHAWARTZBERG,

Appellants.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeals from judgments of conviction for endeavoring to obstruct justice and conspiracy to obstruct justice, 18 U. S. C. §§1503, 371, entered in the District Court for the Southern District of New Yorn after trial before Edward C. McLean, *Judge,* and a jury. Affirmed.

JEROME LEWIS, Brooklyn, N. Y. (Frances Kahn, Bronx, N. Y., and Abraham Glasser, New York, N. Y., with him on the brief), *for the appellant Frances Kahn.*

ROBERT KASANOF, New York, N. Y. (Albert J. Krieger, New York, N. Y., with him on the brief), *for the appellant Pacelli.*

ISRAEL SCHAWARTZBERG, Bronx, N. Y., *pro se.*

JOHN S. MARTIN, JR., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and John E. Sprizzo, Assistant United States Attorney, with him on the brief), *for the appellee.*

MOORE, *Circuit Judge*:

Frances Kahn, Vincent Pacelli, and Israel Schawartzberg appeal from judgments of conviction. All three were convicted of conspiracy to obstruct justice and suborn perjury, in violation of 18 U. S. C. §§371, 1503, and 1622. In addition, Pacelli was convicted of obstructing justice in violation of 18 U. S. C. §1503. Each appellant was sentenced to two years' imprisonment on the conspiracy count. Pacelli also received a two-year concurrent sentence on the substantive count.

1. *The Sufficiency of the Evidence.*

The Government maintained at trial, and the jury found, that the appellants worked together in an effort to prevent one Charles Hedges from testifying against appellant Pacelli. On appeal, each of the appellants challenges the sufficiency of the evidence as to the counts on which he or she was convicted.

Viewing the evidence in the light most favorable to the Government, *United States* v. *Kahaner,* 317 F. 2d 459, 467 (2d Cir.), *cert. denied,* 375 U. S. 836 (1963), the following story emerges from the testimony at trial. Hedges was convicted for violation of the federal narcotics laws and was sentenced to fifteen years' imprisonment by the District Court of the District of Connecticut in March 1961. In July 1962, Hedges agreed to testify against certain of the people with whom he had been associated in the narcotics trade. His testimony before a grand jury in the Southern District of New York in June and September 1964 contributed to an indictment against Pacelli and others for conspiracy to violate the federal narcotics laws. Hedges testified at the trial on that indictment in May 1965.

Towards the end of July 1962, Pacelli visited Joan Hedges, Hedges' first wife; gave her $500; found out that Hedges needed $5,000 to get out on bail pending appeal; and learned that his lawyer was Frances Kahn. On July 30, 1962, Schawartzberg, Kahn's legal secretary, met with Hedges' fiancee and future wife, Patricia Curtin; gave her $3,000 of $5,000 he apparently had received; and instructed her to use the money to open a savings account to be used as collateral for Hedges' bail.

On January 9, 1963, Schawartzberg introduced Pacelli to Hedges' second wife Patricia, saying that Pacelli had put up the money for Hedges' bail. Pacelli told Patricia that he would give Hedges and her as much money as they needed to go away pending the appeal and even afterwards. Schawartzberg told Patricia that "he [apparently meaning Pacelli] just doesn't want Charlie to do anything against him."

On January 14, 1963, Schawartzberg called Patricia, asked if Charlie was still Pacelli's friend, and said that Kahn was going to visit Charlie. Two days later, Kahn visited Hedges and asked what he intended to do. When he said, "Tell them to run because I'm through with them," she said: "I don't think that's like you. You wouldn't do anything like that." She made similar statements during her repeated later visits to Hedges whenever he indicated that he was thinking of "talking."

On September 22, 1963, Kahn told Hedges that if he didn't testify, Vince would lend him $25,000, which he wouldn't have to repay if he were indicted again, and that he would have complete protection.

In July and September 1964, Kahn told Hedges that if he were called before the grand jury he should push back the dates of his dealings in narcotics so that prosecution would be barred by the statute of limitations. In her July visit, she also told Hedges that if he did testify he should make sure that the Government guaranteed his wife's protection, since she was afraid for him and his wife; and she suggested that if he acted crazy he wouldn't have to testify. In an August 1964 visit, apparently referring to Hedges' intention to testify, Kahn said: "I hate to see you destroy yourself, and that's what you'll do."

The evidence just summarized was ample to take to the jury the question of appellants' guilt on the conspiracy count. We find no force in the contentions of Kahn and Schawartzberg that their acquittals on the substantive counts demonstrate the insufficiency of the evidence against them on the conspiracy count. The acquittals at most indicate inconsistency in the jury's verdict, which is not by

itself grounds for reversal, *Dunn* v. *United States*, 284 U. S. 390 (1932); see *United States* v. *Maybury*, 274 F. 2d 899 (2d Cir. 1960). The inconsistency here was not irrational, since the jury could have believed that Schawartzberg and Kahn, while working together with Pacelli, did so at his bidding and were correspondingly less culpable.

The evidence as to Pacelli's membership in the conspiracy was also sufficient to go to the jury. The jury properly could have found not only that Pacelli was working with Schawartzberg and with Schawartzberg's employer Kahn in an effort to keep Hedges quiet, but also that their joint efforts lasted up until the time Hedges began to testify before the grand jury. See *United States* v. *Perlstein*, 126 F. 2d 789 (3d Cir.), *cert. denied*, 316 U. S. 678 (1942).

Pacelli contends that the evidence against him on the substantive count was insufficient as a matter of law, since at the time involved in that count—January 9, 1963—there was no pending proceeding in which Hedges was to testify. See *Pettibone* v. *United States*, 148 U. S. 197, 207 (1893); *United States* v. *Scoratow*, 137 F. Supp. 620 (W. D. Pa. 1956). We need decide neither the correctness of *Scoratow* nor its application to a case in which the potential witness has actually agreed to testify. Pacelli's sentence on the substantive count was concurrent and of the same length as his sentence on the conspiracy count, and we conclude, for reasons set out elsewhere in this opinion, that his conviction on the conspiracy count should be affirmed. See *Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *United States* v. *Benjamin*, 328 F. 2d 854, 856 (2d Cir.), *cert. den.* sub nom. *Howard* v. *United States*, 377 U. S. 953 (1964).

We find no merit in Pacelli's contention that because he rested his case and moved for acquittal at the close of the Government's case, the jury should have been instructed to consider as against him only the evidence adduced on the Government's case. The question of the sufficiency of the Government's case was a legal one; and once the trial court had decided that the Government's case was sufficient to go to the jury, we see no reason why the jury should not also have been free to consider the testimony of Pacelli's co-defendants.

2. *The Motions for Severance.*

Each of the appellants attack the denial by the trial court of his or her motion for a severance. Pacelli contends that the trial court should have severed the case as to him because he was prejudiced by the testimony of Kahn during the presentation of her defense, which tended to establish a link between Kahn and Pacelli which had been supplied only inferentially in the Government's case. This did not by itself require the trial court to sever Pacelli's case, see *United States* v. *Houlihan,* 332 F. 2d 8, 15 (2d Cir.), *cert. denied.* sub nom. *Legere* v. *United States,* 379 U. S. 828, 859 (1964), particularly since Kahn's testimony in no way indicated that she worked together with Pacelli in attempting to keep Hedges quiet. Pacelli also maintains that he was prejudiced by his codefendants' arguments that the whole case was an unfair attempt by the Government to destroy Kahn as a lawyer, since the jury may have thought it had to convict all three defendants in order to clear the Government of the charges made by Schawartzberg and Kahn. We believe that the danger of prejudice to Pacelli from his

codefendants' position was far too remote to require severance. The jury could presumably keep separate the positions of the three defendants in this relatively short and simple trial. Cf. *United States* v. *Bentvena*, 319 F. 2d 916, 930-31 (2d Cir.), *cert. denied* sub nom. *Ormento* v. *United States*, 375 U. S. 940 (1963).

Kahn and Schawartzberg contend that the denial of their motions for severance unfairly restricted their right to call witnesses. The position appears to be that their joint trial made it less likely that Schawartzberg would give exculpatory evidence for Kahn, since at a joint trial, if Schawartzberg testified at all, he would waive the right not to answer questions about the crime charged, *Johnson* v. *United States*, 318 U. S. 189, 195 (1943); McCormick, Evidence §131 (1954), whereas at a separate trial of Kahn, Schawartzberg could have testified in her behalf while refusing to answer questions which incriminated him. This possibility, standing by itself, did not make the denial of a motion for severance erroneous, *Gorin* v. *United States*, 313 F. 2d 641, 645-46 (1st Cir.), *cert. denied*, 374 U. S. 829 (1963); *Olmstead* v. *United States*, 19 F. 2d 842, 847-48 (9th Cir. 1927), *aff'd*, 277 U. S. 438 (1928), at least in the absence of anything in this record indicating that the codefendant would have given exculpatory evidence, see *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965).

3. *The Charge on Conspiracy.*

The trial court's instructions as to the law of conspiracy, attacked by Pacelli as not adequately focusing the attention of the jury on the questions whether the evidence estab-

lished one conspiracy or many and whether Pacelli was a knowing member, were entirely proper in the context of this case. The court not only instructed the jury that it had to find that the conspiracy existed as charged in the indictment, but also that the defendants knowingly associated themselves with the conspiracy and that each defendant's association with the conspiracy had to be determined only from evidence as to that defendant's own acts, declarations, and conduct. See *United States* v. *Stromberg,* 268 F. 2d 256, 265-65 & n. 10 (2d Cir.), *cert. denied,* 361 U. S. 863, 868 (1959).

4. *The Conduct of the Prosecution.*

At several of the interviews between Kahn and Hedges while the latter was in prison, electronic equipment was placed with the consent of Hedges both on Hedges and around the room in an effort to record the conversations between the two. The resulting tapes were not particularly intelligible, since Kahn carried a portable radio with her on her visits and turned it up whenever she had anything important to say.

Appellants' pre-trial motions to suppress these tapes were denied. We do not need to consider the merits of those motions, since the tapes were not introduced or mentioned at trial. Kahn and Schawartzberg contend that the prosecutor hinted at the existence of the tapes in his summation, when, after Kahn's counsel had pointed to Kahn's candor in testifying about the offer of money to Hedges, the prosecutor said, "Do you have any way of knowing whether or not had she denied that the Government could have proved it otherwise?" This brief remark, improper

though it was, did no more than suggest the possession of further proof by the Government, if indeed it did that much; Hedges had testified for the Government as to the offer. Even if the tapes were unconstitutionally obtained, this fleeting reference did not amount to the use at trial of unconstitutionally obtained evidence. Cf. *United States* v. *Guerra*, 334 F. 2d 138 (2d Cir.), *cert. denied*, 379 U. S. 936 (1964).

Nor should the trial court have dismissed the indictment because of the possibility that the tapes might have been played before the grand jury. Even if the tapes were illegally obtained, their admission before the grand jury would not justify the relief requested unless the defense was able to show that the indictment rested solely on incompetent evidence. See *Costello* v. *United States*, 350 U. S. 359 (1956); *Lawn* v. *United States*, 355 U. S. 339 (1958); *Cochran* v. *United States*, 310 F. 2d 585, 590 (8th Cir. 1962). Here, both Hedges and his wife Patricia testified before the grand jury, and their testimony was both competent and ample grounds for the indictment.

Kahn maintains that the conduct of Hedges amounted to entrapment. She requested no charge on entrapment at trial, and was entitled to none. There is no testimony in the record which suggests that Hedges ever asked for money for his wife or himself in return for not testifying.

Kahn and Schawartzberg contend that the use of Hedges, if not entrapment, was so offensive that this court should reverse the convictions resulting from this use in the exercise of its supervisory power over the machinery of federal

justice and law enforcement. Appellants find it particularly heinous that Hedges never told Kahn that he was no longer her client, and seek to show that the Government somehow abused the attorney-client privilege. However, the attorney-client privilege is not involved. That privilege is the client's, not the attorney's; and in any case, it does not extend to advice from the attorney in furtherance of a crime. McCormick, Evidence §96, §99 (1954). Nor is the use of Hedges in some other fashion offensive. As we have seen, he did not solicit bribes from Kahn; she came to him with offers of bribes and with veiled threats that he better not testify.

Kahn also urges upon us as grounds for reversal the alleged misconduct of an Assistant United States Attorney for the Southern District of New York. According to Kahn, Hedges admitted to this Assistant United States Attorney that he had been involved in the narcotics activity for which he had been convicted in Connecticut. This admission was made while Hedges was appealing from his Connecticut conviction, partly on the grounds of the insufficiency of the evidence against him. We fail to see how Hedges' right to challenge the sufficiency of the evidence against him was affected by his post-trial admission of guilt; or what the receipt of the post-trial admission, which apparently did not exculpate any of the codefendants, obliged the Assistant United States Attorney to do. In any event, the matter is entirely irrelevant to the present appeal.

5. Rulings During the Course of Trial.

Appellants contend that a variety of the rulings of the trial court were erroneous. Kahn argues that the attorney-client privilege was improperly invoked to prevent her from describing the legitimate objectives of her many visits to Hedges in prison, and that this restriction made it seem that she visited Hedges only for illicit purposes; suborning perjury or trying to prevent him from testifying. However, as the Government makes clear in its brief, Kahn herself suggested that she should not go into the nature of the topics discussed with Hedges. She hardly can object to a ruling she invited and did not object to when made.

Kahn and Schwartzberg contend that Hedges should not have been allowed to invoke his privilege against self-incrimination when questioned about the details of crimes, the commission of which he already had admitted. We do not think it was reversible error to prevent defense exploration of the details of the crimes on cross-examination. Hedges may well have waived his privilege against self-incrimination by admitting commission of the crimes, but Kahn and Schawartzberg had already gotten most of the benefit they were going to get out of the crimes by virtue of Hedges' admission. His admission at once undermined his own credibility and indicated a legitimate lawyer-client reason for the many visits by Kahn to Hedges in prison. Exploration of the details of the crimes would have been largely superfluous. See *United States* v. *Irwin*, 354 F. 2d 192, 198 (2d Cir. 1965); *United States* v. *Owens*, 263 F. 2d 720, 722 (2d Cir. 1959).

Appellants also contend that the court should not have permitted the jury to be present when the Jencks Act material was being marked for identification. Perhaps it would be better had the identification of the Jencks Act material been done in the absence of the jury, see *Johnson* v. *United States,* 347 F. 2d 803, 806 (D. C. Cir. 1965); but this taken by itself is not sufficient grounds for reversal. See *Roberson* v. *United States,* 282 F. 2d 648, 650-51 (6th Cir.), *cert. denied,* 364 U. S. 879 (1960).

6. *Conclusion.*

We have carefully considered each of the remaining assignments of error put forward by the appellants, and find them devoid of merit. The convictions are accordingly affirmed.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Frances Kahn, and Israel Schwartzberg, and Vincent Pacelli,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

Opinion of United States District Court

McCLEAN, District Judge.

Defendants have been indicted for endeavoring to influence a government witness and for obstructing the due administration of justice, in violation of 18 U.S.C. § 1503, and for conspiracy to do so, and to suborn perjury, in violation of 18 U.S.C. § 371. Defendants now move, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, to suppress certain recordings of conversations between defendant Kahn and the witness, Charles Hedges, and "all evidence pertinent thereto." I held a hearing and took testimony on this motion. The facts developed at this hearing are as follows:

In January 1961, Hedges was indicted in the United States District Court for the District of Connecticut for violation of the narcotics laws. He was tried from February 15 to March 21, 1961. He was convicted and sentenced to imprisonment for fifteen years and to pay a fine of $10,000. Defendant Kahn, an attorney, represented Hedges in that trial.

The District Court in Connecticut fixed Hedges' bail pending appeal in the sum of $50,000. He was unable to make that bail and consequently he was imprisoned in the Federal Penitentiary in Lewisburg, Pa. In late June 1962 he was transferred from Lewisburg to the Federal House of Detention on West Street, New York City. At that time he informed the United States Attorney of this district that he desired to "cooperate" with the government. Just

what form this "cooperation" took and what information he gave to the United States Attorney at that time was not brought out at the hearing.

In July 1962 Hedges was transferred from West Street to the Westchester County Jail in Valhalla, New York, a New York State penal institution. He was there as a federal prisoner pursuant to some arrangement between the federal and the state authorities. He remained there approximately one month. In July 1962 defendant Kahn, as Hedges' attorney and at his request, moved for a reduction of bail. The District Court in Connecticut reduced it to $25,000. Hedges posted that bail and was thereupon released from prison in August 1962.

On December 11, 1962, Hedges was involved in a shooting incident, the details of which were not explained. Apparently he exchanged shots with somebody and as a result of this gunplay, he was wounded. He was sent for treatment to Kings County Hospital for a time and in January 1963, after he had recovered from his wound, he was sent back to Westchester County Jail. A state charge of violation of the Sullivan law was filed against him. This charge has never been disposed of.

Hedges took an appeal from his narcotics conviction. Defendant Kahn prosecuted the appeal as his attorney. The Court of Appeals affirmed his conviction in March 1963.

He did not apply for certiorari. Instead he applied to the District Court in Connecticut for a reduction of sentence. Defendant Kahn made this motion on his behalf. In May 1963, the District Court in Connecticut reduced his sentence

from fifteen to five years. Hedges served the remainder of this sentence in the Westchester County Jail. He was released in May 1965.

Defendant Kahn visited Hedges frequently at the Westchester County Jail. The record shows that she made 37 visits to him there between January 1963 and May 1965. At least eleven of these visits were made in the year 1964. The visitors' slips and other records maintained by the prison authorities with respect to visitors, describe defendant Kahn as Hedges' "attorney."

The interviews between defendant Kahn and Hedges usually took place in the sheriff's office. This was the customary place for interviews between prisoners and female attorneys who, according to the deputy warden, are not allowed to go "back on the floor."

On September 20, 1963, a judge of the County Court, Westchester County, made an order, pursuant to the New York statute (Code of Criminal Procedure, § 813-a) upon the application of the Acting District Attorney of Westchester County, authorizing the Acting District Attorney "or his duly authorized agents," to eavesdrop upon the personal conversations of Charles Hedges and to "install such electronic equipment as may be necessary to assure the eavesdropping, overhearing and recording of the said conversations." The order provided that it should be effective until November 20, 1963. As far as appears, no subsequent order was obtained.

Also on September 20, 1963, Hedges made an affidavit in which he swore that defendant Kahn had made certain

statements to him, including a statement that defendant Pacelli had said that he would take care of all the expenses of Hedges' family and that he would see that Hedges had nothing to worry about if Hedges did not testify. Hedges further said in his affidavit:

> "That I wish to cooperate with the Federal authorities to assist them in obtaining evidence against the suspects in this case. I make this offer for that purpose and consent that any and all future conversations between myself and Mrs. Kahn may be intercepted and put to use by the Federal Government for whatever purpose it deems fit."

This affidavit was delivered to the Acting District Attorney of Westchester County but it was not made part of the application for the eavesdropping order.

In October 1963, a federal narcotics agent installed electronic eavesdropping equipment in the Westchester County Jail. He concealed a transmitter under a desk in the sheriff's office and a receiver, together with recording equipment, in a nearby room. A similar transmitter was given to Hedges, who affixed it to his person. An interview took place between defendant Kahn and Hedges in the sheriff's office on October 6, 1963. Federal agents eavesdropped upon his conversation by use of the electronic equipment and made a record of it.* The eavesdropping equipment was removed by the federal agents at the end of the day on October 6.

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* Apparently shortly prior to October 6, 1963, an effort was made by federal agents to overhear and record a conversation between defendant Kahn and Hedges on this equipment. Because of mechanical difficulties, the record "did not come out." It was completely unintelligible.

In September 1964, federal agents again installed eavesdropping equipment in the sheriff's office. Two conversations between defendant Kahn and Hedges were overheard and recorded by federal agents, one on September 27, 1964, and the other on October 13, 1964. Shortly thereafter the equipment was removed.

The federal agent in charge of this investigation testified that federal officers did no eavesdropping on conversations between defendant Kahn and Hedges in the sheriff's office except on the four occasions when recordings were made.

In December 1963 a state officer, a deputy sheriff, installed electronic eavesdropping equipment in another room in the jail, the assistant warden's office. Apparently this was done on the expectation that conversations between defendant Kahn and Hedges would take place in that room. However, these expectations were not fulfilled. The deputy sheriff listened in on this equipment some five or six times in December 1963. On some of these occasions a federal officer also listened with him. They heard no conversations between defendant Kahn and Hedges. Apparently defendant Kahn and Hedges were not even there. No recordings were made because there was nothing to record. These activities are therefore irrelevant to this motion.

The government has produced the four recordings made by federal agents as heretofore described. I permitted attorneys for all defendants and also defendant Kahn and defendant Schawartzberg (who at his own insistence has no attorney in this action) to hear these recordings. I have listened to them as well. The government has represented to

this court that it has produced all recordings of conversations between defendant Kahn and Hedges in its possession or of which it has knowledge. I rely upon that representation. I find that there was no eavesdropping upon the electronic equipment installed by federal agents except that which was recorded upon the four records which have been produced. We are concerned on this motion, therefore, only with those four records.

The records are largely unintelligible because of the interference of "background noises." Some words can be caught here and there. Although invited by the court to do so, the government has not stated what use it proposes to make of these records at the forthcoming trial. It takes the position that that question is irrelevant on the present motion. In this I believe that the government is correct. The question now before me is not what the recordings prove, if anything, but whether they should be suppressed completely on the ground that the eavesdropping and the recording infringed defendants' constitutional rights.

Before turning to that subject, I note the explanation for the mechanical difficulties in the recording. The background noise was made by a transistor radio. Defendant Kahn testified that she brought this radio with her and played it during her interviews with Hedges because it was "notorious" that eavesdropping went on at the Westchester County Jail. The fact that recordings were made of her conversations obviously came as no surprise to her.

Considerable testimony and argument have been devoted to the question of whether, at the time the conversations were recorded, the relationship of attorney and client

existed between defendant Kahn and Hedges. There is no doubt that that relationship existed at least until May 1963. There is evidence that thereafter Hedges sought and obtained defendant Kahn's legal advice about the Sullivan Law charge and about an application which Hedges was considering, but which, as it turned out, he never made, for an order of this court directing that he be returned to Lewisburg. Hedges testified that although he did not regard defendant Kahn as his attorney after his conviction was affirmed and his sentence was reduced, he never told her so. He did not retain any other attorney. As previously noted, the prison authorities treated defendant Kahn as Hedges' attorney throughout. Defendant Kahn could reasonably have believed that she continued to be his attorney, even after her active services with respect to the criminal prosecution were concluded.

For the purposes of this motion, I shall assume that the attorney-client relationship existed at the relevant times, i. e., October 1963 and September and October 1964. I shall consider the constitutional question raised by this motion in the light of that assumption.

Defendants have asserted rights under a variety of constitutional provisions. The New York Civil Liberties Union has also mentioned several in a brief filed amicus curiae in support of the motion. Between them, defendants and the amicus curiae claim that the eavesdropping and recording violated no less than six different amendments, i. e., the First, Fourth, Fifth, Sixth, Ninth and Fourteenth. Some of these contentions are clearly without merit.

Since we are here concerned with evidence obtained by federal officers for use in a federal criminal prosecution, the Fourteenth Amendment obviously has no application. The right of a defendant in a criminal prosecution "to have the Assistance of Counsel for his defense," guaranteed by the Sixth Amendment, is not involved. This case is not like Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) where the eavesdropping of defendant's conversations occurred after defendant had been indicted and had retained counsel.

The First and Ninth Amendments, in my opinion, have at most only a tangential bearing upon the case. In *Griswold* v. *State of Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), relied upon by defendants here, a state statute which forbade the use of contraceptives was held to violate the Fourteenth Amendment. The Court discussed "the right of privacy" enjoyed by married couples. In the course of its opinion it mentioned the First Amendment and said of it that it "has a penumbra where privacy is protected from governmental intrusion." (381 U.S. at 483, 85 S. Ct. at 1681) The Court also quoted the Ninth Amendment which provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Court implied that the "right of privacy" is one of these rights retained by the people.

To my mind, it is not necessary to strain the language of the First or Ninth Amendments in order to raise the

problem presented in this case. It is squarely raised by the Fourth Amendment which provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

So much of the Fifth Amendment as provides that no person" shall be compelled in any criminal case to be a witness against himself" is also involved, in the sense that where unreasonable search and seizure is concerned, "the Fourth and Fifth Amendments run almost into each other." Boyd v. United States, 116 U.S. 616 at 630, 6 S. Ct. 524 at 532, 29 L. Ed. 746 (1886) cited in Lopez v. United States, 373 U.S. 427 at 455-456, 82 S. Ct. 1381 at 1396-1397, 10 L. Ed. 2d 462 (1963) (dissenting opinion). Philosophically speaking, obtaining evidence from a defendant by an unreasonable search and seizure may be said to violate his privilege against self-incrimination, i. e., his right to protect and retain the incriminating evidence which was unreasonably seized. But the fundamental question still is: Was the search and seizure unreasonable?

In considering the authorities which bear upon this question, a proper starting point is On Lee v. United States, 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1270 (1952). In that case a government undercover agent who was a friend of defendant, engaged defendant in conversation in defendant's place of business, which was also his home. The agent was "wired for sound," i. e., he had an electronic transmitter concealed upon his person. Defendant made incriminating admissions in the course of the conversation. They were transmitted by the electronic device to another government

agent who was stationed outside the building with a receiving apparatus. This latter agent testified at the trial to the conversations. Defendant's conviction was affirmed. The Court held that there was no unreasonable search and seizure.

In recent years the attitude of the Supreme Court has changed markedly from that expressed in *On Lee*, where the Court said (343 U.S. at 754, 72 S. Ct. at 972):

> "It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure."

The question has arisen as to whether *On Lee* is still good law. Lopez v. United States, 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963) bears directly on that question. There an Internal Revenue agent, also wired for sound, made a recording by an electronic recording device of conversations which he had had with defendant in the latter's place of business. The Court held that the Fourth Amendment was not violated and that the record was properly admitted. The Court cited *On Lee*. Three justices dissented. The Chief Justice, while concurring with the majority in the result, agreed with the dissenters that *On Lee* was wrongly decided.

No case has been cited to me, and I have found none, which has expressly overruled *On Lee*. I have no doubt that the views of what thus far is a minority of the Supreme Court would condemn the eavesdropping that oc-

curred in this case. But it is the duty of a district judge to follow majority opinions, not dissenting ones. If the law is to be changed, the Supreme Court, not the district court, must change it. If the law as it now stands sanctions what was done here, this court must apply and enforce that law.

There are certain points of difference between *On Lee* and *Lopez* and the present case. The question is whether these differences permit or require a different result. If thy do not, then *On Lee* and *Lopez* require a denial of the present motion.

The first point of difference is that in *On Lee* and *Lopez,* the eavesdropping occurred in defendant's home or place of business. Here it occurred in a jail. This difference weighs in favor of the government. In Lanza v. State of New York, 370 U.S. 139, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962), the Supreme Court said, in what concededly was a dictum, that:

> "* * * it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day." (370 U.S. at 143, 82 S. Ct. at 1221)

This amounts to saying that a jail is not a constitutionally protected area. Neither counsel nor I have been able to find any other authority on this point. I feel obliged to follow this pronouncement of the Supreme Court, even though it is a dictum.

Moreover, I agree with it. I do not accept defendants' argument that the sheriff's office was really defendant

Kahn's law office, pro tem. It was a room in a jail, which she was permitted to use at the sufferance of the prison authorities.

This also disposes of the second factual difference. In *On Lee* and *Lopez*, the person carrying the listening device gained entrance to defendant's home or place of business with defendant's consent and without trespass. Here defendant Kahn did not consent. If federal officers, without her knowledge, had surreptitiously entered her home or office and had therein concealed an electronic transmitter, this would have been a trespass which, under the rule of the "spike mike" cases, would doubtless have invalidated the search. Cf. Silverman v. United States, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961).

But since the sheriff's office in a jail is not defendant Kahn's home or office, there was no trespass when federal officers, with the consent of the prison authorities, installed a listening device in it.

The third difference is that in neither *On Lee* nor *Lopez* was there any attorney-client relationship between the parties. In *Lanza*, again by way of dictum, the Court said:

> "Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any such special relationship here." (370 U.S. at 143-144, 82 S. Ct. at 1221)

Just what the Court meant by this is not entirely clear. It may be noted, however, that in *Lanza*, the eavesdropping

was carried on by third persons without the knowledge of either participant in the conversation. Here one participant, Hedges, the client, was fully aware of it and indeed actively facilitated it. Moreover, for whatever it may be worth, it is apparent that the other participant, defendant Kahn, the attorney, suspected it and took precautions to frustrate it by the use of her radio. Under these circumstances, the mere fact that the conversations were between an attorney and her client does not render unreasonable what would otherwise be a reasonable search and seizure. Benson v. People of State of California, 336 F. 2d 791 (9th Cir. 1964), cert. denied, 380 U.S. 951, 85 S. Ct. 1086, 13 L. Ed. 2d 970 (1965).

The principle is well settled that the attorney-client privilege is for the protection of the client. The privilege is his, not the attorney's. Hunt v. Blackburn, 128 U.S. 464, 9 S. Ct. 125, 32 L. Ed. 488 (1888); Wild v. Payson, 7 F.R.D. 495, 500 (S.D.N.Y. 1946); 8 Wigmore, Evidence (McNaughton Rev. 1961) § 2321 at 629.

Here the client's privilege was not violated. There was no attempt to eavesdrop upon a client while he was disclosing confidential information to his attorney. The whole purpose of the eavesdropping, on the contrary, was to secure, with the active collaboration of the client, evidence of the commission of a crime by the attorney, i.e., the offering of a bribe to a prospective witness, a crime which the government had probable cause to believe would be committed by the attorney. An attorney has no privilege to attempt to bribe his client. The existence of an attorney-client relationship between the parties to these conversa-

tions, therefore, on the facts disclosed by the evidence here, is not a factor which distinguishes this case from *On Lee* or which requires a result on the constitutional question different from that reached in *On Lee*.

It is argued that there is a fourth difference between *On Lee* and *Lopez* and the present case. In *On Lee* and *Lopez*, the eavesdropping did not, as far as appears, violate state law. Defendants claim that here it did. They point to Sections 738 and 739 of the New York Penal Law, McKinney's Consol. Laws, c. 40, and to Section 813-a of the New York Code of Criminal Procedure.

Section 738(2) provides that a person "not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion * * * without the consent of a party to such conversation or discussion" shall be guilty of a felony.

Section 739 provides that eavesdropping pursuant to an ex parte order granted pursuant to Section 813-a of the Code of Criminal Procedure, shall be exempt from the provisions of Section 738.

It is true as far as the evidence discloses, there was no state court order which authorized anyone to eavesdrop on the conversations in September and October 1964. Moreover, the order of September 20, 1963, issued under Section 813-a, did not purport to authorize federal officers to eavesdrop, unless the federal officers may be said to be the "duly authorized agents" of the Acting District Attorney of Westchester County, who was the person empowered by the order to eavesdrop at that time.

The short answer to defendants' contentions is that there was no eavesdropping here at all, within the meaning of Section 738 of the Penal Law, because one of the parties to the conversations consented. People v. Velella, 200 N.Y.S. 2d 966 (Gen. Sess. N.Y. Co. 1960).

Furthermore, the Court of Appeals for the Second Circuit has held that, in a case in which, as far as one can tell from the opinion, neither party to the conversation consented, "the New York statutes" (meaning apparently both the Penal Law and the Code of Criminal Procedure) do not apply to federal law enforcement officers. United States v. Pardo-Bolland, 348 F. 2d 316 (2d Cir. 1965), cert. denied, 382 U.S. 944, 86 S. Ct. 388, 15 L. Ed. 2d 353 (1965). See also United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964).

Hence, the federal officers did not violate New York law in this case.

I conclude, therefore, that defendants' constitutional rights have not been violated by the overhearing and recording of the conversation of defendant Kahn and Hedges. In view of this conclusion, it is unnecessary to consider whether or not it is only the defendant Kahn, the only defendant whose conversations were overheard, who, in any event, has any standing to complain.

In thus deciding the constitutional question in favor of the government, I express no opinion as to whether the records of these conversations have sufficient probative force to justify their admissibility. I will pass upon that question if and when they are offered.

Motion denied.

So ordered.